Supreme Court, U.S.
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No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1997

UNITED STATES OF AMERICA, *EX REL.* D. J. FINDLEY,

Petitioner,

vs.

FPC-BORON EMPLOYEES' CLUB, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether certiorari should be granted to resolve the conflict among the circuits on the meaning of the term "based upon" in 31 U.S.C. § 3730(e)(4)(A) (1994), as used in this case to dismiss a qui tam lawsuit brought on behalf of the Government to combat fraud.

2. Whether certiorari should be granted to resolve the issue of whether information of a generalized type of false claim constitutes "public disclosure" under 31 U.S.C. § 3730(e)(4)(A) (1994), thereby preventing an individual with direct and independent knowledge of subsequent, specific false claims of the same type, or subsequent, specific false claims of a different type, from bringing a qui tam action to remedy those false claims.

3. Whether certiorari should be granted to resolve the conflict among the circuits as to what constitutes an "original source" under 31 U.S.C. § 3730(e)(4)(B) (1994).

PARTIES TO THE PROCEEDING

Relators D. J. Findley and Paul Lazerson brought a qui tam action, United States *ex rel.* Findley v. FPC-Boron Employees' Club, No. 1:94-CV-01477 (filed July 6, 1994), under the False Claims Act, 31 U.S.C. §§ 3729-3733 (1988), in the U.S. District Court for the District of Columbia. The United States declined to intervene, and there were no other intervenors or amici. Petitioner D. J. Findley was the only Appellant before the United States Court of Appeals for the District of Columbia Circuit. D. J. Findley is the only Petitioner in the present action.

Respondents, Federal Prison Camp-Boron ("FPC-Boron") Employees' Group, are associations of prison guards who operate vending machines at federal prisons. Respondents were Defendants in the district court proceedings of this case and Appellees before the United States Court of Appeals for the District of Columbia.

There are no other parties to this action.

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OPINIONS BELOW

On January 24, 1997, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in U.S. *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675 (D.C. Cir. 1997), affirming the decision of the United States District Court for the District of Columbia in U.S. *ex rel* Findley v. FPC-Boron Employees' Club, No. 94-1477, slip op. (D.D.C. June 30, 1995). On March 18, 1997, the United States Court of Appeals for the District of Columbia Circuit issued its Order in the same case denying the Appellant's Petition for Rehearing.

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment of the United States Court of Appeals for the District of Columbia Circuit dated January 24, 1997. That judgment affirmed the lower court`s grant of summary judgment. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1) (1994).

An Order denying Appellant`s Petition for Rehearing was issued on March 18, 1997. A petition for writ of certiorari intended to bring any judgment in a civil action, suit or proceeding before the Court for review shall be taken within ninety days after the entry of such judgment. 28 U.S.C. § 2101(c) (1994). Rule 13 of the U.S. Supreme Court Rules states that the time to file a petition for a writ of certiorari runs from the date of the denial of the petition for rehearing, which in the present case was March 18, 1997. This Petition for Writ of Certiorari is filed on time.

STATUTE INVOLVED

31 U.S.C. § 3730

* * * *

(e) CERTAIN ACTIONS BARRED.--

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, `original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily

provided the information to the Government before filing an action under this section which is based on the information.

STATEMENT OF THE CASE

This is a qui tam action brought by a "private attorney general" on behalf of the U.S. Government. The Respondents are associations of prison guards who operate vending machines at federal prisons, and then pocket the profits earned from this "captive audience." The District Court had jurisdiction over Relator D.J. Findley's Complaint pursuant to the False Claims Act, 31 U.S.C. § 3729-3733 (1994) ("FCA"), and 28 U.S.C. § 1331 (1994). Petitioner D. J. Findley filed this action under the FCA, 31 U.S.C. § 3730(b)(1) (1994), with the U.S. District Court for the District of Columbia because the Respondents conduct "private" procurements for vending machines located on United States prison property, and unlawfully divert profits from these machines to themselves and away from the Federal Government, in violation of 31 U.S.C. §§ 3729(a) & 3302 (1994). The Respondents retained funds that do not belong to them, and used these funds for a variety of personal indulgences such as Las Vegas gambling junkets, white-water rafting trips, and parties, in violation of the FCA. The following is a brief statement of the facts.

On October 26, 1993, Petitioner Findley, on behalf of his employer Premiere Vending, attended a Pre-Proposal Conference for a request for proposals ("RFP") issued by the U.S. Bureau of Prisons ("BOP"). The RFP sought services for some, but not all, of the vending machines located in the federal prison at Boron, California. As the conference ended, members of the Respondent FPC-Boron Employees' Club appeared and distributed copies of another solicitation. This other, "private" solicitation was for services for other vending machines at the Boron Federal Prison Camp -- vending machines excluded from BOP's RFP. See Premiere Vending, B-256560, 94-2 CPD ¶ 8. Under this solicitation of services, the vending machine contractor would pay Boron prison employees, directly, for the right to service those vending machines at the Federal Prison Camp at Boron. Id.

Petitioner's observation of the FPC-Boron Employees' Club members' actions prompted Petitioner to question the propriety of this private procurement. On December 30, 1993, the Petitioner wrote to the BOP questioning "private" procurement of services for vending machines on Federal property, and the FPC-Boron Employees' Club's diversion of the resulting income. Responding to statements that the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107f (1994) permitted such diversion of funds, the Petitioner also questioned the applicability of this statute to the FPC-Boron Employees' Club's actions, and Respondents' compliance with it. Id. At the same time, the Petitioner filed a protest with the agency that asserted the applicability of the Competition in Contracting Act, 41 U.S.C. § 253 et seq. (1994) ("CICA") to the Employees' Club's procurement. The agency denied the protest, and Premiere protested to the U.S. General Accounting Office ("GAO"). The GAO ruled that CICA did not apply to the FPC-Boron Employees' Club procurement. The GAO never addressed whether it was legal for the FPC-Boron Employees' Club to divert income from the Federal Government by means of this private procurement.

The Petitioner determined that the FPC-Boron Employees' Club's treatment of income from the vending machines violated numerous federal statutes and regulations, including the FCA, as well as BOP guidelines regarding vending machine sales. On July 6, 1994, Petitioner filed this action with the United States District Court for the District of Columbia, on behalf of the United States, to force the Respondents to return their ill-gotten gains, stop diverting to their personal use money that does not belong to them, and stop making false claims to mask their diversion. It is undisputed that Findley learned about the Respondents' false claims as an employee of a vending machine company seeking to service the vending machines at FPC-Boron.

On April 10, 1995, Respondents the FPC-Boron Employees' Group filed a Motion to Dismiss in the U.S. District Court. The Defendants' Motion asserted, inter alia, that the U.S. District Court lacked subject matter jurisdiction under 31 U.S.C. § 3730(e)(4) (1988), the statute quoted above. This statute bars qui tam actions "based upon

the public disclosure of allegations or transactions" in a variety of fora, unless "the person bringing the action is an original source of the information," i.e., someone with "direct and independent knowledge of the information on which the allegations are based." The U.S. District Court granted the Defendants' Motion, and dismissed Findley's action for lack of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4) (1994), in Findley, No. 94-1477, slip op. at 1. The U.S. District Court dismissed Findley's action because it believed that the general fact that Federal employees retain profits from vending machines had been publicly disclosed, and Findley is not an original source of the information. Findley, No. 94-1477, slip op. at 9.

The U.S. District Court never addressed the questions of whether the Respondent's means of conducting the vending machine procurement, handling of income from the vending machines, or submission of the numerous false claims alleged in the Complaint, violated any Federal statute or regulation. This lower court decision was upheld by the United States Circuit Court for the District of Columbia Circuit in Findley, 105 F.3d 675 (D.C. Cir. 1997).

The Court of Appeals looked at three issues, which it acknowledged called for first-time interpretations in its circuit and have caused a split amongst its sister circuits, to determine whether the Petitioner had subject matter jurisdiction under the FCA. The court addressed, first, the meaning of the phrase "based upon" under the FCA. Second, the court interpreted whether information of a generalized type of false claim constitutes "public disclosure" under 31 U.S.C. § 3730(e)(4)(A)(1994), thereby preventing an individual with direct and independent knowledge of subsequent, specific false claims of the same type, or subsequent, specific false claims of a different type, from bringing a qui tam action.[1] Finally, the court interpreted the

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[1] This Court has granted certiorari and heard oral arguments in Hughes Aircraft Co. v. U.S. *ex rel.* Schumer, 63 F.3d 1512 (9th Cir. 1995), cert. granted, in part, __ U.S. _, 117 S. Ct. 293 (1996), to determine whether information which is "potentially" available under the Freedom of Information Act, 5 U.S.C. § 552 (1996) ("FOIA"),

meaning of "original source" under the FCA. Petitioner maintains that the court incorrectly decided each of these three issues.

Petitioner now seeks the review of this Court.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONGST THE CIRCUITS OF THE MEANING OF THE TERM "BASED UPON" IN 31 U.S.C. § 3730(e)(4)(A) (1994), AS USED IN A QUI TAM LAWSUIT BROUGHT ON BEHALF OF THE GOVERNMENT TO COMBAT FRAUD.

A complaint in a qui tam action will be dismissed if it is found that the action is,

> **based upon** the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A) (1994) (emphasis added). There is a conflict amongst the courts of appeals concerning the interpretation of the phrase "based upon," as used in this section of the statute. Some circuits have ruled that the phrase "based upon" means "supported by," rather than "caused by." See U.S. *ex rel.* Fine v. Sandia Corp., 70 F.3d 568 (10th Cir. 1995) (qui tam actions based only in part upon public disclosures are barred under section 3730(e)(4)(A)); U.S. *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645 (D.C. Cir. 1994); U.S. *ex rel.* Precision Co. v Koch Indus., 971 F.2d 548 (10th Cir.

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constitutes a "public disclosure" under the FCA.

1992), cert. denied, 507 U.S. 951, subsequent appeal, cause remanded, 31 F.3d 1015 (10th Cir. 1994); Wang v. FMC Corp., 975 F.2d 1412 (9th Cir. 1992). The Fourth Circuit, however, has recently held that the phrase "based upon" means "used as a basis for," or "actually derived from." U.S. *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1349 (4th Cir. 1994), cert. denied, _ U.S. _, 115 S. Ct. 316 (1994). The D.C. Circuit Court of Appeals, in our case, rejected the Fourth Circuit's interpretation and held that Petitioner Findley's allegations were "based upon," i.e. "supported by," information the court found to be publicly disclosed (i.e., two court decisions and legislative history for a statute), even though it is undisputed that Findley's allegations were "actually derived from" his observations at the Pre-Proposal Conference, not the information that the court cited.

The difference in interpretation of this simple, two-word phrase has an enormous effect upon the outcome of the jurisdictional issue for the relator. Those courts that have decided that the phrase "based upon" means "supported by," have severely limited the scope of the statute. When a court states that a qui tam action cannot be "supported by" a public disclosure, it is stating that an FCA action which is "even **partly** based upon publicly disclosed allegations or transactions is nonetheless 'based upon' such allegations or transactions." Precision Co., 971 F.2d at 552 (emphasis added). Thus, even if the public disclosure does not form the actual basis for the action, under this interpretation, a qui tam action will be barred.

The Tenth Circuit, in Precision Co., believed this restrictive interpretation was consistent with the following purposes of the statute: "1) to encourage private citizens with first-hand knowledge to expose fraud; and 2) to avoid civil actions by opportunists attempting to capitalize on public information without seriously contributing to the disclosure of the fraud." Id. As noted above, several other circuits have followed this narrow interpretation.

The outcome of such a restrictive interpretation, however, is actually contrary to the intent and purpose of the statute, as the present case makes clear. The provision at issue here was one of many 1986 amendments to the FCA. As the Tenth Circuit noted, the FCA was

enacted to encourage private citizens to expose fraud. The 1986 amendments to the statute supported this purpose, as they were proposed "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 345, 99th Cong., 2d Sess., at 1, reprinted in 1986 U.S.C.C.A.N. at 5266. Congress acknowledged that this purpose could be fulfilled only by "a coordinated effort of both the Government and the citizenry." Id. at 2, reprinted in 1986 U.S.C.C.A.N. at 5266-67. To encourage private citizen action, the 1986 amendments increased the financial incentives for private individuals to bring suits on behalf of the Government. Id. Interpreting the phrase "based upon" too restrictively is inconsistent with the statute's intent, because it precludes private citizens with first-hand knowledge of fraud from bringing an action.

Thus, one circuit has completely rejected this restrictive interpretation of the phrase "based upon," while others have avoided the issue altogether by basing the decision on other points. In Springfield Terminal Ry. Co, for example, the court expressed its uneasiness with interpreting the phrase "based upon" to mean "supported by" and stated:

> When, as here, some information relied upon by the qui tam plaintiff is undeniably in the public domain, the task of ensuring that qui tam suits are limited to those in which the relator has contributed significant independent information can prove tricky.

(Springfield Terminal Ry. Co., 14 F.3d at 653 (emphasis in original)). The court believed that the restrictive interpretation followed by other circuits "erected too high a threshold for the qui tam plaintiff [in this case]." Id. Thus, the court looked at whether the public disclosure was based upon "allegations or transactions," and not just mere information, placing the emphasis on the type of information that was acquired.

The Fourth Circuit, in Becton Dickinson & Co., rightly differed from the other courts and held that the only fair construction of the phrase "based upon" is for it to mean "derived from." Becton Dickinson & Co., 21 F.3d at 1348. Thus, a relator's action is "based

upon" a public disclosure "only where the relator has actually derived from that disclosure the allegations upon which his qui tam action is based." Id. This interpretation of the phrase supports the purpose of the FCA because "a suit that includes allegations that happen to be similar (even identical) to those already publicly disclosed, but were not actually derived from those public disclosures, simply is not, in any sense, parasitic." Id.

In the case below concerning Petitioner Findley, the D.C. Circuit Court of Appeals rejected, outright, the Fourth Circuit's logic and reasoning. This has resulted in an outcome which defies the purpose and intent of the FCA. The D.C. Circuit held that the intent of the FCA requires a "broader construction of the jurisdictional bar to encompass situations in which the relator's complaint repeats what the public already knows, even though he had learned about the fraud independent of the public disclosures." Findley, 105 F.3d at 683. The court held that Findley's complaint, filed in 1994, was "based upon," or "supported by," 1974 legislative history of the Randolph-Sheppard Act, a 1952 Comptroller General Opinion, and a 1986 opinion of the federal circuit, because all discussed other federal employees using other federal facilities for the provision of vending services and the retention of revenue from such services.[2] None of these disclosures

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[2] The 1974 legislative history vaguely stated that "[f]ederal employee welfare and recreation groups have for many years depended for their activities on income derived from vending machines on Federal Property . . . ." Findley, 105 F.3d at 685 (quoting S. Rep. No. 93-937, 93d Cong., 2d Sess., at 22 (1974)). This was legislative history for the Randolph-Sheppard Act, which allows blind persons to operate vending stands in federal buildings and, by implication, bars the practice at issue here. The 1952 Comptroller General Opinion, Vending Machines, B-112480, 32 Comp. Gen. 282 (1952), concerned the propriety of post office employees' clubs retaining profits from vending machines on government property. The 1986 opinion of the Federal Circuit, Texas State Comm'n for the Blind v. United States, 796 F.2d 400 (Fed. Cir. 1986) (en banc), cert. denied, 479 U.S. 1030 (1987), reiterated the

(continued...)

concern the FPC-Boron Employees' Club, nor is Petitioner Findley's complaint "based upon" these disclosures, which do not even mention the FPC-Boron Employees' Club. However, the restrictive interpretation relied on by the D.C. Circuit, and other circuits, leads to the absurd result that criminal misconduct cannot be redressed under the FCA.[3] The court should have followed the correct interpretation enumerated in the Fourth Circuit's decision in Becton Dickinson & Co., which construes the phrase "based upon" to mean "derived from." Had the D.C. Circuit done so, it would have found that Findley's specific allegations against FPC-Boron in its 1994 complaint were not "derived from" vague information over forty years old concerning other groups.

Petitioner submits that certiorari should be granted to determine the correct interpretation of "based upon," as used in the FCA.

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE ISSUE OF WHETHER INFORMATION OF A GENERALIZED TYPE OF FALSE CLAIM CONSTITUTES "PUBLIC DISCLOSURE" UNDER 31 U.S.C. § 3730(e)(4)(A) (1994), THEREBY PREVENTING AN INDIVIDUAL WITH DIRECT AND INDEPENDENT KNOWLEDGE OF SUBSEQUENT, SPECIFIC FALSE CLAIMS OF THE SAME TYPE, OR SUBSEQUENT, SPECIFIC FALSE CLAIMS OF A DIFFERENT TYPE, FROM BRINGING A QUI TAM ACTION TO REMEDY THOSE FALSE CLAIMS.

(...continued)
history of GAO and congressional inaction regarding these employee groups' retention of funds.

[3] The lower court did not address this, but the U.S. Criminal Code expressly forbids any federal employee from deriving any compensation from any source other than the U.S. Government. 18 U.S.C. § 203 (Supp. 1997).

According to the FCA, 31 U.S.C. § 3730(e)(4)(A),

> No court shall have jurisdiction over an action under this section based upon the **public disclosure** of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

An issue has arisen regarding what constitutes a "public disclosure" under the statute. Again, the lower court in Findley, supra, ruled that legislative history and two decisions touching on other federal employees at other locations constituted "public disclosure" of Findley's allegations. Yet, "[t]he government often knows on a general level that fraud is taking place and that it, and the taxpayers, are losing money. But it has difficulty identifying all of the individual actors engaged in the fraudulent activity." Cooper v. Blue Cross & Blue Shield, 19 F.3d 562, 566 (11th Cir. 1994). The "public disclosure" issue has become so muddied that this Court recently heard arguments concerning whether "potentially" available information released under FOIA constitutes "public disclosure" under the FCA. See Hughes Aircraft Co. v. U.S. *ex rel.* Schumer, supra. Although the circuits attempt to define this phrase and resolve this confusion with each FCA action, the results have been tumultuous, often costing the Government, literally, billions of dollars in fraud recovery. The effects of this confusion are evidenced below.

In Blue Cross & Blue Shield, the relator in that qui tam action discovered that Blue Cross & Blue Shield ("BCBS") of Florida was billing Medicaid, and thus the Government, falsely. BCBS argued, and the district court agreed, that false Medicaid billing had been "publicly disclosed" in several GAO reports, newspaper articles, a complaint and Office of Inspector General documents. On appeal, the Eleventh Circuit looked at each of these documents to determine whether BCBS of Florida was specifically mentioned by name or otherwise specifically identified in the "public disclosures." According to the court,

"allegations of widespread [Medicaid Secondary Payer] fraud made in sources in which BCBS [of Florida] was not specifically named or otherwise directly identified are insufficient to trigger the jurisdictional bar." Id.

The court correctly reasoned that "[r]equiring that allegations specific to a particular defendant be publicly disclosed before finding the action potentially barred encourages private citizen involvement and increases the chances that every instance of specific fraud will be revealed." Id. In fact, the court stated that even the GAO report, which specifically mentioned BCBS of Florida, was not a "public disclosure" because the report did not allege that BCBS of Florida engaged in fraudulent conduct. See also U.S. *ex rel.* Rabushka v. Crane Co., 40 F.3d 1509, 1514 (8th Cir. 1994) (the jurisdictional bar "is given effect when the essential elements comprising that fraudulent transaction have been publicly disclosed so as to raise a reasonable inference of fraud").

In contrast, the Tenth Circuit, in Sandia Corp., stated that the disclosures made in that case were "public," even though the facts there were akin to those in Blue Cross & Blue Shield. In Sandia Corp., the GAO had issued a report examining the legality of taxing nuclear waste in research and development activities at three labs, including Sandia laboratory. Sandia's lab was one of nine multi-program labs owned by the U.S. Government and operated by private or university contractors under the Department of Energy's ("DOE") administrative oversight. Later, a congressional hearing further probed this issue. At that time, the relator, Mr. Fine, was an auditor with the DOE's Inspector General's office where he audited Sandia. After Mr. Fine retired, he still investigated the possible fraudulent conduct of Sandia, and eventually brought suit under the FCA. The district court dismissed the complaint for lack of subject matter jurisdiction.

The relator argued to the court that the disclosures of the GAO report and congressional hearing merely described the national labs' practice of taxing nuclear waste funds, but did not address the specific false claims of Sandia. The court held that,

> [b]ecause these disclosures detailed the mechanics of the practice, revealed that at least two of Sandia's eight sister laboratories were engaged in it, and indicated the DOE's acquiescence, we conclude that they sufficiently alerted the government to the likelihood that Sandia would also tax nuclear waste funds in the future.

Sandia Corp., 70 F.3d at 571. Thus, the disclosures were deemed "public."

These two cases illustrate the variation among the circuits as they seek to define the term "public disclosure." The facts in the cases are similar, yet the conclusions are opposite. The wrong interpretation of this phrase jeopardizes the intent and purpose of the FCA, as evidenced by the Tenth Circuit decision in Sandia, and the decision by the D.C. Circuit in Findley.

In Findley, the court held, as stated above, that a 1974 legislative history of the Randolph-Sheppard Act, a 1952 Comptroller General Opinion, and a 1986 opinion of the federal circuit, publicly revealed the information asserted in Findley's complaint, even though none of these disclosures relate to FPC-Boron, much less allege that FPC-Boron has engaged in fraudulent criminal misconduct. The court relied on its decision in Springfield Terminal Ry. Co., in which it stated "qui tam actions are barred only when enough information exists in the public domain to expose the fraudulent transaction . . . or the allegation of fraud . . . ." Findley, 105 F.3d at 686 (quoting Springfield Terminal Ry. Co., 14 F.3d at 654). While these "disclosures" may have been made available to the public, and they all vaguely discussed federal employees using federal facilities for the provision of vending services and the retention of revenue from such services, they did not "publicly disclose" Petitioner Findley's allegations of fraud by FPC-Boron Employees' Clubs. Not one of those documents specifically names the FPC-Boron Employees' Club.

The court reiterated that "it is our task to ensure that 'qui tam suits are limited to those in which the relator has contributed significant independent information . . . .'" Id. (quoting Springfield Terminal Ry.

Co., 14 F.3d at 653). Yet, in this qui tam action, the court ignored the fact that Petitioner Findley discovered and investigated, on his own, the fraud alleged in his complaint -- the type of fraud the FCA sought to eradicate.

This interpretation, that a generalized discussion of a type of false claim is "public disclosure" that bars:

- all qui tam actions concerning all subsequent, specific instances of such false claims,

- **plus** allegations of false claims that were **never discussed** in the public disclosure,

ignores the plain language of section 3730(e)(4)(A) and, taken literally, has the effect of barring all private attorney general qui tam actions.[4] As such, it is imperative that certiorari be granted to decide this issue.

III.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHAT CONSTITUTES AN "ORIGINAL SOURCE" UNDER 31 U.S.C. § 3730(e)(4)(B) (1994).

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[4] For example, Title 48 of the Code of Federal Regulations states, in tremendous detail, what federal contractors can and cannot do. These regulations are all publicly disclosed in the Federal Register and are the subject of thousands of GAO and court decisions and articles in newspapers. Under the court of appeals ruling here, all qui tam actions based upon violations of these regulations would be **barred**, because such unspecific and vague disclosures constitute "public disclosure" under the FCA. See Blue Cross & Blue Shield, 19 F.3d at 566 n.7 (applying such a restrictive interpretation would bar a qui tam suit against any member of the defense industry, for example, if there had been a media account of "industry-wide" corruption in the defense industry). This eviscerates the intent and purpose of the statute. Id.

The provision at issue here is a two-part test. In the first part, which has been discussed supra, a court must determine whether the action is:

> based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media. . . .

31 U.S.C. § 3730 (e)(4)(A) (1994). If it is determined that the action is based upon a public disclosure, there is one more determination to be made. In this second part, the court determines whether the "person bringing the action is an original source of the information" in the complaint. Id. According to the statute, an

> 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4)(B) (1994). Although Congress has defined "original source" in the statute, there is still much debate over who constitutes an original source. Some courts believe that to be an original source, the relator must have given the information to the source that publicly disclosed it. Other circuits believe that to be an original source, one must merely (as the statute says) have "direct and independent knowledge of the information on which the allegations [of his complaint] are based." Id. The outcomes vary greatly depending upon the definition the court uses.

The Second Circuit, in U.S. *ex rel.* Dick v. Long Island Lighting Co., 912 F.2d 13, 16 (2nd Cir. 1990), stated that an original source must have direct and independent knowledge of the information on which the allegations are based, have voluntarily provided such information to the government prior to filing, **and** "also must have

directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based." The Ninth Circuit agreed, in Wang, and stated that one is an original source only if he had a hand in the public disclosure, even if he "saw [it] with his own eyes." Wang, 975 F.2d at 1417.

The Fourth Circuit in Becton Dickinson & Co., supra, however, held that the statute does not require an individual to be the source to the original disclosing entity to qualify as an original source. A person can be an "original source" as long as he obtained the information for the complaint independently from the public disclosure. Becton Dickinson & Co., 21 F.3d at 1351.

Although the D.C. Circuit Court in Findley stated it agreed with the Fourth Circuit's definition of "original source," in that the relator need not have provided the information to the disclosing entity, it differed on another point. The court believed that to be an original source, the relator must "provide the information to the government prior to any public disclosure," thereby positing yet another judicial gloss on the statutory definition for "original source." Findley, 105 F.3d at 691. The D.C. Circuit held that "[b]ecause the employees' groups' questionable transactions were publicly disclosed in a manner recognized by the FCA before Findley even became aware of the practices, he cannot qualify as an original source" Id.

The D.C. Circuit's definition of "original source," like some of the other circuits, defies the plain meaning of the statute, which specifically defines "original source" as "a person with direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(A) (1994). Petitioner Findley had **direct** knowledge of the questionable practices, because he witnessed them himself. This knowledge was **independent** of anything disclosed previously, because the incidents stated in the Complaint occurred years after the general purported public disclosures, and involve a specific, named group and specific, named incidents. Under the Fourth Circuit's ruling, Findley would likely be an "original source." Under the Second and Ninth Circuit's test, he would likely not. Likewise, under the D.C. Circuit's new test, Findley was held not to be an "original source." In

all instances, however, Petitioner Findley has direct and independent knowledge of the information on which he based his allegations, as required by the statute.

The wrong interpretation of "original source" under the FCA leads to a court asking the wrong question of the relator and, obviously, reaching the wrong result. The pertinent inquiry is whether the relator, in this case Findley, is an original source of the allegations in his Complaint, not whether he is an original source of general information. Those circuits that have added other requirements to determine who an "original source" is, have ignored the words and thus the plain meaning of the statute itself, and have gone astray from the true purpose and intent of the FCA. The Fourth Circuit, however, has logically reasoned and held that the statute "requires only that the relator have direct and independent knowledge of the information underlying the allegations of a false claim and voluntarily provide the information to the government before filing his qui tam action." Becton Dickinson & Co., 21 F.3d at 1351.

To prevent further confusion on the issue, and more illogical results, the Court should grant certiorari to resolve the conflict concerning the proper interpretation of "original source" under 31 U.S.C. § 2730(e)(4)(B) (1994).

CONCLUSION

It is clear that the above issues concerning the FCA need to be addressed to prevent the statute from being nullified as a result of restrictive and wrong interpretations on the FCA's jurisdictional bar. If the current trend regarding application of the jurisdictional bar in an FCA action continues, the statute, with respect to qui tam actions, will become meaningless and moot. Petitioner submits that this Honorable Court should resolve these issues.

Respectfully submitted,

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APPENDIX A-ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT FILED MARCH 18, 1997

No. 95-7189 SEPTEMBER TERM, 1996
94cv01477

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, *ex rel* D.J. FINDLEY,

Plaintiff-Appellant,

v.

FPC-BORON EMPLOYEES' CLUB, et al.,

Defendants-Appellees.

BEFORE: Wald, Williams and Tatel, Circuit Judges.

ORDER

Appellant petitions for rehearing on the narrow ground that the court failed to address an allegation in his complaint that Bureau of Prisons' ("BOP") employees' clubs violated a BOP program statement by taking 100 percent of the revenues received from vending machines within prison facilities when the program statement only permitted them to retain 85 percent of the revenues. The portion of his complaint that refers to violations of the program statement does so only in the most general terms, with a particularized allegation only that the employees' clubs did not follow regulations for the procurement of vending machine services from outside vendors. Since appellant's complaint and his briefs on appeal fail to give adequate notice of the claim that he now advances, the petition for rehearing is denied.

Appendix A

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX B-OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-7189

UNITED STATES OF AMERICA, *ex rel.* D.J. FINDLEY,

Plaintiff-Appellant,

v.

FPC-BORON EMPLOYEES' CLUB, et al.,

Defendants-Appellees.

105 F.3d 675
November 19, 1996, Argued
January 24, 1997, Decided

PRIOR HISTORY: Appeal from the United States District Court for the District of Columbia (No. 94cv01477).

DISPOSITION: Affirmed.

COUNSEL: Alan M. Grayson argued the cause and filed the briefs for appellant.

Michael L. Martinez argued the cause for appellees, with whom Lynn Estes Calkins was on the brief.

BEFORE: WALD, WILLIAMS and TATEL, Circuit Judges. Opinion for the Court filed by Circuit Judge WALD.

OPINION BY: WALD

OPINION: WALD, Circuit Judge: D.J. Findley and Paul Lazerson brought this qui tam action alleging that government

employees' clubs that earn revenue from vending services on federal property are violating the False Claims Act ("FCA" or "Act"), 31 U.S.C.§ § 3729-3733, by retaining monies owed to the government. The FCA permits private individuals such a cause of action against those who submit false claims to the government. Such plaintiffs are identified as relators and entitled to receive a portion of any government recovery for bringing suit.

The district court found that the practice of government employees' clubs retaining vending machine income was widely known at the time this action was brought and dismissed the case in reliance on the Act's jurisdictional bar against qui tam suits that are "based upon the public disclosure of allegations or transactions...." 31 U.S.C.§ 3730(e)(4)(A). This appeal, brought solely by relator Findley, calls for a first time interpretation in this circuit of aspects of the Act's public disclosure bar that have caused splits among our sister circuits. Our analysis of the language, structure, history and purpose of the FCA supports an interpretation of the public disclosure bar that limits qui tam jurisdiction to those cases in which the relator played a role in exposing a fraud of which the public was previously unaware. Because we find that Findley is not such a relator, we affirm the district court's dismissal of this action.

I. FACTUAL BACKGROUND

Relators Findley and Lazerson learned of the circumstances underlying this suit while attending a pre-proposal conference to discuss a Bureau of Prisons ("BOP") request for proposals to service certain vending machines at Federal Prison Camp-Boron ("FPC-Boron"). At the conclusion of the conference they were handed a solicitation for services from members of the FPC-Boron Employees' Club concerning additional vending machines also located at FPC-Boron, but operated by the FPC-Boron Employees' Club rather than the BOP. The Employees' Club's machines are located in employee and visitor lounge areas at FPC-Boron. The BOP pays for the utilities used to operate the machines but, under the terms of a BOP Program

Statement, the Employees' Club retains eighty-five to one hundred percent of the machines' profits.

Findley and Lazerson submitted a bid for the contract to service the Employees' Club's vending machines, but did not receive the contract. They protested to the BOP and the General Accounting Office ("GAO") regarding the propriety of the Employees' Club procuring such services, but their protests were denied. Thereafter, Findley and Lazerson filed this action against all employees' clubs of the BOP and the United States Department of Justice that earn revenue from the provision of vending services on federal property. They alleged that the vending machine revenue is used to fund social events and recreational junkets for federal employees and that the retention of the vending profits for these purposes violates a number of civil and criminal laws, including the FCA. The complaint names the Employees' Club at FPC-Boron as the representative defendant in the action. As required by the FCA, 31 U.S.C. § 3730(b)(2), relators filed their complaint under seal in order to permit the government 60 days to decide whether to intervene as plaintiff. The United States declined to intervene, and relators proceeded with the action.

The district court dismissed the complaint for lack of subject matter jurisdiction based upon a jurisdictional limitation on qui tam actions which bars suits "based upon the public disclosure of allegations or transactions," unless the relator is an "original source" of the information underlying the allegation. See 31 U.S.C. § 3730(e)(4)(A). The district court relied on a 1952 Comptroller General Opinion which questioned the legality of postal employees' clubs retaining vending revenue and on legislative history of the Randolph-Sheppard Act, 20 U.S.C.§§ 107-107f, which granted blind vendors priority in operating vending machines on federal property. These two sources were both cited in Texas State Comm'n for the Blind v. United States, 796 F.2d 400 (Fed. Cir. 1986), cert. denied, 479 U.S. 1030, 93 L. Ed. 2d 828, 107 S. Ct. 874 (1987), in which the Federal Circuit considered whether vending revenue secured at military exchanges was exempt from the Randolph-Sheppard Act.

Appendix B

The district court determined that these three public sources constituted public disclosure in a "General Accounting Office report," "congressional report," or "civil hearing" precluding qui tam jurisdiction of the practices alleged to violate the FCA because

> [b]efore the filing of this action, enough information was in the public domain to expose the allegation that government employees are perpetrating a fraud upon the government by maintaining vending machines on Federal property. The government itself presumably could have brought an action against employees' clubs such as the one at FPC-Boron ... [without] a qui tam suit in the present case.

United States *ex rel.* Findley v. FPC-Boron Employees' Club, No. 94-1477, slip opinion ("slip op.") at 8 (D.D.C. June 30, 1995). The court concluded that "because the information that relators bring has been a subject of discussion in Congress, in the GAO, and in the Federal courts over the past forty years, as well as appearing in publicly available BOP documents, relators cannot be considered to possess the considered to possess the "independent knowledge" necessary to be an "original source". Id. at 9.

Relator Findley appeals the dismissal of his qui tam claim, arguing principally that he did not learn of the Employees' Club's false claims from publicly disclosed allegations or transactions, that his complaint alleges different transactions and allegations than those in the public domain and that he qualifies as an original source who is not barred by the public disclosures. This appeal raises issues that have led to disagreement among other courts of appeals that previously have considered the public disclosure bar, the central focus of which involve the relationship a qui tam relator must have to publicly disclosed allegations or transactions in order to trigger the FCA's jurisdictional bar and in order to benefit from the exception to the bar for original sources. Any attempt to interpret the oft-amended qui tam provisions of the FCA begins with the history of the Act, which illustrates

Congress' effort to navigate between several interests that, at times, appear to work at cross-purposes with each other.

II. THE DEVELOPMENT OF THE PUBLIC DISCLOSURE BAR

As enacted during the Civil War, the FCA allowed any private party to bring suit, in the name of the government, based on the individual's knowledge of fraud against the government. Act of March 2, 1863, ch. 67, § 4, 12 Stat. 698 (1863) (current version at 31 U.S.C. §§ 3729-3731). The qui tam provisions offset inadequate law enforcement resources and encouraged "a rogue to catch a rogue" by inducing informers "to betray [their] co-conspirator." CONG. GLOBE, 37th Cong., 3d Sess. 955-96 (1863). The incentive to blow the whistle on fraudulent conduct was provided by the Act's provisions permitting a successful qui tam relator one-half of the recovery against the offending parties. S. REP. NO. 345, 99th Cong., 2d Sess., at 10, reprinted in 1986 U.S.C.C.A.N. 5266, 5275 ("Senate Report").

The Act was seldom utilized, however, until the 1930s and 1940s when increased government spending opened up numerous opportunities for unscrupulous government contractors to defraud the government. Qui tam litigation surged as opportunistic private litigants chased after generous cash bounties and, unhindered by any effective restrictions under the Act, often brought parasitic lawsuits copied from preexisting indictments or based upon congressional investigations. Such ill-motivated suits not only diminished the government's ultimate recovery without contributing any new information, but the rush to the courthouse put pressure on the government to make hasty decisions regarding whether to prosecute civil actions.

When the Supreme Court decided United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 87 L. Ed. 443, 63 S. Ct. 379 (1943), permitting a qui tam suit in which the relator copied his complaint directly from a criminal fraud indictment, Congress finally took action to prevent such piggy-back lawsuits. The House of Representatives supported a bill

that would have repealed altogether the qui tam provisions. The Senate's bill would have barred jurisdiction where a qui tam suit was based upon information in the government's hands, unless the relator was the source of that information. Senate Report at 12, 1986 U.S.C.C.A.N. 5277. The Senate version prevailed, but the original source provision was dropped in conference. See United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1153 (3d Cir. 1991). Thus, the FCA, as amended in 1943, barred qui tam suits that were "based upon evidence or information in the possession of the United States ... at the time such suit was brought." Act of December 23, 1943, 57 Stat. 608, recodified in 31 U.S.C. § 3730(b)(4) (1982) (superseded).

As amended, the Act contained no protection for those whistleblowers who furnished evidence or information to the government in the first place. Citing the fact that Congress refused in 1943 to adopt a specific provision protecting the viability of qui tam suits brought by an original source of the information in the government's hands, the courts barred suits brought by those original sources. See Wang v. FMC Corp., 975 F.2d 1412, 1419 (9th Cir. 1992). But it soon became apparent that by restricting qui tam suits by individuals who brought fraudulent activity to the government's attention, Congress had killed the goose that laid the golden egg and eliminated the financial incentive to expose frauds against the government. The use of qui tam suits as a weapon for fighting fraud against the government dramatically declined.

A 1984 Seventh Circuit decision highlighted another defect of the 1943 amendments to the FCA. In United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984) ("Dean"), the jurisdictional bar was interpreted to preclude the state of Wisconsin from acting as a qui tam plaintiff in a civil suit charging Medicaid fraud because the state had already reported the fraud to the United States Department of Health and Human Services, as required by statute. Even though it was Wisconsin that had brought the fraud to the federal government's attention, the state was barred from its own qui tam action because its

own disclosure put enough information in the federal government's hands to trigger the jurisdictional bar. To exacerbate the inequity, the federal government had declined to intervene in Wisconsin's qui tam action and had filed a brief indicating that it believed that Wisconsin was a proper relator. Id. at 1102 n.2. The Seventh Circuit nonetheless noted that "if the State of Wisconsin desires a special exemption to the False Claims Act because of its requirement to report Medicaid fraud to the federal government, then it should ask Congress to provide the exemption." Id. at 1106.

In 1986, Congress responded to the Seventh Circuit's invitation by amending the Act yet another time in order to "encourage more private enforcement suits." Senate Report at 13, 1986 U.S.C.C.A.N. 5288-89.[1] After ricocheting between the extreme permissiveness that preceded the 1943 amendments and the extreme restrictiveness that followed, Congress again sought to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute on their own." United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 304 U.S. App. D.C. 347, 14 F.3d 645 at 649; United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318, 321 (2d Cir. 1992); Wang v. FMC Corp., 975 F.2d at 1419. Accordingly, the 1986 amendments repealed the "government knowledge" jurisdictional bar and replaced it with a provision that restricts the subject matter jurisdiction of private plaintiff suits

> based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action

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[1] Portions of the legislative history of the 1986 amendments to the FCA specifically mention this holding of United States *ex rel.* Wisconsin v. Dean. See, e.g., Senate Report at 12-13, 1986 U.S.C.C.A.N. 5277-78.

> is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). The statute describes an "original source" as

> an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4)(B). Predictably, these jurisdictional provisions too have led to extensive litigation and to circuit splits concerning the meaning of the words "based upon," "public disclosure," "allegations or transactions," "original source," "direct and independent knowledge" and "information." Virtually every court of appeals that has considered the public disclosure bar explicitly or implicitly agrees on one thing, however: the language of the statute is not so plain as to clearly describe which cases Congress intended to bar.

III. ANALYSIS

Our fundamental task in interpreting the FCA is "to give effect to the intent of Congress." United States v. American Trucking Ass'ns, 310 U.S. 534, 542, 84 L. Ed. 1345, 60 S. Ct. 1059 (1940). The starting point for interpreting a statute is the language of the statute itself. Consumer Product Safety Comm'n v. GTE Sylvania Inc., 447 U.S. 102, 64 L. Ed. 2d 766, 100 S. Ct. 2051 (1980). "In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." Crandon v. United States, 494 U.S. 152, 158, 108 L. Ed. 2d 132, 110 S. Ct. 997 (1990). Finally, if ambiguity persists, we must construe the ambiguous term "to contain that permissible meaning which fits most logically into the body of both previously and subsequently enacted law." West Virginia Univ. Hospitals, Inc. v. Casey, 499 U.S. 83, 100, 113 L. Ed. 2d 68, 111 S. Ct. 1138 (1991). We review the district court's dismissal for lack of subject matter jurisdiction de novo. Moore

v. Valder, 314 U.S. App. D.C. 209, 65 F.3d 189, 196 (D.C. Cir. 1995), cert. denied, 136 L. Ed. 2d 35, 117 S. Ct. 75 (1996). In doing so, we construe the complaint favorably to relator Findley. Id.

The FCA sets up a two-part test for determining jurisdiction.

> First, the reviewing court must ascertain whether the "allegations or transactions" upon which the suit is based were "publicly disclosed" in a "criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media." 31 U.S.C. § 3730(e)(4)(A). If--and only if--the answer to the first question is affirmative, will the court then proceed to the "original source" inquiry, under which it asks if the qui tam plaintiff "has direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B).

United States *ex. rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d at 651 (internal citation omitted). We begin with the public disclosure question.

A.

The district court answered "yes" to the first part of the jurisdictional test, concluding that there was enough information "in the public domain to expose the allegation that government employees are perpetrating a fraud upon the government by maintaining vending machines on Federal property ... [without] a qui tam suit in the present case." United States *ex rel.* Findley v. FPC-Boron Employees' Club, No. 94-1477, slip op. at 8. Findley responds that he never heard of the various reports and public statements upon which the district court relied for its conclusion, so his complaint could not have been "based upon" those public sources of information, and that the allegations and transactions that he uncovered were different from anything publicly disclosed in the manner set forth by the statute.

Appendix B

1. The Meaning of the Phrase "Based Upon"

Until the Fourth Circuit's decision in United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1347-50 (4th Cir.), cert. denied, 130 L. Ed. 2d 278, 115 S. Ct. 316 (1994) ("Siller"), all courts of appeals speaking to the question had implicitly agreed with the position of the Employees' Club here, that the jurisdictional bar is triggered whenever the relator files a complaint describing allegations or transactions substantially similar to those in the public domain, regardless of the actual source for the information in the particular complaint. The most complete explanation why the public disclosure bar should be applied in this broad manner has been provided by the Tenth Circuit. In United States *ex rel.* Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 552 (10th Cir. 1992), cert. denied, 507 U.S. 951, 122 L. Ed. 2d 742, 113 S. Ct. 1364 (1993) ("Precision"), the Tenth Circuit examined the phrase "based upon the public disclosure of allegations or transactions" and explained that "as a matter of common usage, the phrase 'based upon' is properly understood to mean 'supported by.' " Id. Relying on the principle that "statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction," Id. (citing F&S Construction Co. v. Jensen, 337 F.2d 160, 161 (10th Cir. 1964)), the Tenth Circuit reasoned that its limited interpretation of who could sue under the statute protected the incentive for private citizens with first-hand knowledge to expose fraud, but also prohibited civil actions brought by opportunists who do not contribute anything significant to the exposure of the fraud. Id.; see United States *ex rel.* Doe v. John Doe Corp., 960 F.2d at 324 (a relator need not have actually derived his knowledge from a public disclosure in order for his action to have been "based upon" that disclosure); see also Cooper v. Blue Cross and Blue Shield of Florida, Inc., 19 F.3d 562, 567 (11th Cir. 1994); United States *ex rel.* Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148, 1158 (2d Cir.), cert. denied, 508 U.S. 973, 125 L. Ed. 2d 663, 113 S. Ct. 2962 (1993); Houck on behalf of United States v. Folding Carton Admin. Comm., 881 F.2d 494, 504 (7th Cir. 1989), cert.

denied, 494 U.S. 1026, 494 U.S. 1027, 108 L. Ed. 2d 609, 110 S. Ct. 1471 (1990).

The Fourth Circuit explicitly rejected that approach in Siller, and held that the term "based upon" bars only suits in which the information relied on by the relator was derived solely from the public disclosures. United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d at 1349. The Fourth Circuit turned to Webster's Third New International Dictionary, which defined "to "base upon' " as meaning "to 'use as a basis for,' " and extrapolated that the phrase "based upon" in the FCA means "actually derived from." Id. According to the Fourth Circuit, such a definition gives fullest effect to Congress' desire to prevent parasitic lawsuits in which a relator freeloads off another person's effort to uncover fraud. The court explained that "a suit that happens to be similar (even identical) to [public disclosures], but [was] not actually derived from those public disclosures, simply is not, in any sense, parasitic." Id. We reject Siller, however, because our review of the language, structure, history and purpose of the FCA demonstrates that Congress sought to limit qui tam actions "to those in which the relator has contributed significant independent information [that is not already in the public domain]." United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d at 653.

When the Siller court turned to Webster's Third New International Dictionary, it located an acceptable definition of the term "to 'base upon' " on which to reach its result, but the court performed its analysis without fully considering the context of the phrase's inclusion in the FCA. "A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.' " United States v. American Trucking Ass'ns, 310 U.S. at 544 (citation omitted). Moreover, an equally reasonable reading of "the language employed in § 3730(e)(4)(A) suggests that Congress sought to prohibit qui tam actions ... when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain." United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d at

654. Because the language of the statute is ambiguous, we must consider the structure and context of the ambiguous language in order to avoid expanding our jurisdiction beyond the scope intended by Congress.

We find the interpretation of "based upon" adopted in Siller inconsistent with the basic structure of the FCA because it renders the "original source" exception to the public disclosure bar largely superfluous. See Robert Salcido, Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Jurisdictional Bar to Qui Tam Actions, 24 PUB. CONT. L.J. 237, 272-73 (1995). The FCA requires that a relator have "direct and independent" knowledge of the alleged fraud or some of its components, and have voluntarily provided the information to the government, in order to benefit from the "original source" exception to the jurisdictional bar. See 31 U.S.C. § 3730(e)(4)(B) (emphasis added). Independent knowledge is "knowledge that is not itself dependent on public disclosure." United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d at 656 (citing Houck on behalf of United States v. Folding Carton Admin. Comm., 881 F.2d at 505).

Why, one may ask, assuming the Fourth Circuit test of "based upon" as meaning "derived from," would Congress provide an exception in the case of a relator who has actually derived his complaint from public information, that allows him to demonstrate that he already provided his independently obtained knowledge to the government before he filed suit? Such a test strains the meaning of the word independent to encompass a relator who, after reading about a fraudulent transaction in The Washington Post or The Washington Times, conducts an "independent" investigation to obtain direct knowledge of the fraud and beats the government to the courthouse. Such relator could fulfill the "original source" governmental notice requirement by delivering a courtesy copy of a proposed complaint outlining the same information that is in the public domain to the Attorney General the day before filing the official complaint under seal

and serving it on the Attorney General.[2] Thus, under the Fourth Circuit's interpretation, the primary "based upon" test swallows the original source exception whole. Using "based upon" as a proxy for whether the relator's complaint merely parrots what is already in the public domain, on the other hand, leads logically to a subsidiary inquiry into whether the relator had obtained the information in his complaint independently prior to the disclosure and so is an "original source."

We believe the background of Congress' repeated attempts to craft a qui tam provision that "encourages whistleblowing and discourages opportunistic behavior ...," United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d at 651, supports our broader construction of the jurisdictional bar to encompass situations in which the relator's complaint repeats what the public already knows, even though she had learned about the fraud independent of the public disclosures. While the overarching purpose of the 1986 amendments was to encourage more private enforcement suits, see Senate Report at 23-24, 1986 U.S.C.C.A.N. 5288-89, a specific element of the change was to '"correct[ ] restrictive [court] interpretations of the Act's ... qui tam jurisdiction' provisions." Wang v. FMC Corp., 975 F.2d at 1419 (second alteration and omission in original) (quoting Senate Report at

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[2] Congress provided that qui tam complaints be filed under seal and served only on the government in order to allow the government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the government is already investigating and whether it is in the government's interest to intervene and take over the civil action. 31 U.S.C. § 3730(b); See Senate Report at 24, 1986 U.S.C.C.A.N. 5288-89; see United States *ex rel.* Pilon v. Martin Marietta Corp., 60 F.3d 995 (2d Cir. 1995). This requirement would make the "original source" governmental notice requirement appear to serve little purpose.

4, 1986 U.S.C.C.A.N. at 5269).[3] The legislative history to the 1986 amendments confirms that United States ex rel. Wisconsin v. Dean, 729 F.2d 1100, in which Wisconsin was precluded from pursuing a qui tam action simply because it had previously provided the government with the same information upon which it based its suit, provided a catalyst for enacting the liberalizing revisions. See Senate Report at 12-13, 1986 U.S.C.C.A.N. 5277-78. The 1986 amendments were thus "remedial, not innovative. Congress wanted in 1986 what it apparently thought it had in 1943: a law requiring that the relator be the original source of the government's information." Wang v. FMC Corp., 975 F.2d at 1419 (emphasis in original).

Indeed, the legislative history to the 1986 amendments refers only to the court's refusal to recognize an original source exception to the jurisdictional bar. It did not seek to alter or even mention another critical interpretation of the qui tam provision in Dean, consistent with a long line of prior cases, that the jurisdictional bar is triggered whenever "the evidence and information in possession of the United States at the time the FCA suit was brought was sufficient to enable it to adequately investigate the case and to make a decision whether to prosecute." Pettis *ex rel.* United States v. Morrison-Knudsen Co., Inc., 577 F.2d 668, 674 (9th Cir. 1978); see United States *ex rel.* Wisconsin v. Dean, 729 F.2d at 1103-04; United States *ex rel.* Joseph v. Cannon, 206 U.S. App. D.C. 405, 642 F.2d 1373, 1377 (D.C. Cir. 1981) (same), cert. denied, 455 U.S. 999, 71 L. Ed. 2d 865, 102 S. Ct. 1630 (1982); United States *ex rel.* Weinberger v. Florida, 615 F.2d 1370, 1371 (5th Cir. 1980). In applying this test, these courts had to implicitly reject any interpretation of the phrase "based upon" that

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[3] To enhance the incentive to bring qui tam actions, the amendments added protection for original sources, increased monetary awards, adopted a lower burden of proof, and allowed relators to continue to participate in the actions after intervention by the government. United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d at 1154.

required the individual relator to have gathered his information from the government's files. For example, the Dean case held that Wisconsin's qui tam action was "based upon evidence or information in the possession of the United States" because the government could have brought its own FCA suit, even though it was undisputed that the facts alleged in Wisconsin's qui tam complaint were not "derived" from information in the hands of the federal government at the time the suit was brought.

When Congress amended the Act in 1986, the jurisdictional bar was changed from one precluding actions "based upon evidence or information in the possession of the United States" to one precluding actions "based upon the public disclosure of allegations or transactions...." Congress thus changed the focus of the jurisdictional bar from evidence of fraud inside the government's overcrowded file cabinets to fraud already exposed in the public domain. See United States ex rel. Rabushka v. Crane Co., 40 F.3d 1509, 1521 (8th Cir. 1994) (Magill, J., dissenting), cert. denied, 132 L. Ed. 2d 829, 115 S. Ct. 2579 (1995).[4] We find no support either in the language or the

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[4] Several courts have interpreted the change in the focus of the jurisdictional bar from government knowledge to public knowledge as serving the purpose of expanding the universe of potential qui tam relators to include those classes of government employees that are not otherwise specifically precluded by the statute from bringing a qui tam action. See, e.g., United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493 (11th Cir. 1991); United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991); United States ex rel. Erickson v. American Inst. of Biological Sciences, 716 F. Supp. 908, 918 (E.D. Va. 1989); but see United States *ex rel.* Fine v. Chevron, U.S.A., Inc., 72 F.3d 740, 743-44 (9th Cir. 1995) (government auditor can never be an "original source" because he can never be deemed to have provided the information to the government "voluntarily"), cert. denied, 135 L. Ed. 2d 173, 116 S. Ct. 1877 (1990).

(continued...)

legislative history of the 1986 amendments, however, that in making this alteration Congress intended to change the established meaning of "based upon."

While our interpretation of the jurisdictional bar may on occasion prevent qui tam lawsuits that may not be truly "parasitic," the blocking of freeloading relators who copy their complaints directly from public disclosures is not the FCA's only concern. From its inception, the qui tam provisions of the FCA were designed to inspire whistleblowers to come forward promptly with information concerning fraud so that the government can stop it and recover ill-gotten gains. Once the information is in the public domain, there is less need for a financial incentive to spur individuals into exposing frauds. Allowing qui tam suits after that point may either pressure the government to prosecute cases when it has good reasons not to or reduce the government's ultimate recovery.

(...continued)

Another reason for this particular change to the jurisdictional bar was to prod the government into action. See Senate Report at 3-4, 7-8, 24-26, 1986 U.S.C.C.A.N. 5268-69, 5272-73, 5289-91 (discussing inadequacy of government FCA enforcement). See United States ex rel. Doe v. John Doe Corp., 960 F.2d at 323. That purpose was not served by stopping qui tam suits whenever evidence or information of fraud was buried somewhere in a government file. Permitting qui tam suits based upon information known by the government but not the public, however, would discourage lackadaisical law enforcement. Once allegations of fraud or fraudulent transactions are revealed to members of the public, "the government can no longer throw a cloak of secrecy around the allegations...." Id. Public pressure then will lead to the prosecution of important cases and the jurisdictional bar will prevent relators from interfering with the government's interest if there is a legitimate reason to delay the prosecution.

2. Application of the Public Disclosure Prong of the Jurisdictional Bar

We turn now to the case at hand and apply the first prong of the public disclosure test to assess whether Findley's complaint is "based upon" the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or GAO report, hearing, audit, or investigation, or in the news media. See 31 U.S.C. § 3730(e)(4)(A). The district court relied upon a 1952 Comptroller General Opinion, legislative history of the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107f, and an opinion of the Federal Circuit as evidence that the material components of the relator's suit were already publicly disclosed. The 1952 Comptroller General Opinion in Vending Machines, B-112,840, 32 Comp. Gen. 282 (1952), was the result of a GAO hearing concerning the propriety of post office employees' clubs retaining profits received from vending machines on government premises. The Comptroller General recognized that "contractual arrangements for the installment purchase, installation, and operation of vending machines at various post offices were made by various postal employee groups with administrative approval, and with the understanding that any proceeds received by the employee groups from the operation of the machines could be retained by them." Id. at 284. Even though "the legal authority of the administrative officials to have agreed to such an arrangement is doubtful," the Comptroller General decided not to stop the practice. Id. (citing B-111,086, 32 Comp. Gen. 124 (1952) (advising that vending machine income at the Federal Bureau of Investigation was received "for the use of the United States")).

In 1974, during the process of amending the Randolph-Sheppard Act, the issue arose again. The Senate Report on those amendments recognizes that

> [f]ederal employee welfare and recreation groups have for many years depended for their activities on income derived from vending machines on Federal Property.... Blind organization representatives

> strongly object to the retention of this income by employee groups, stating that vending machines operated by or for such groups compete with blind vending facilities and pose serious threats to the livelihood of blind vendors. Further, they say, federal law and opinions of the Comptroller General support the position that such income may not legally accrue to such groups--their operation is not provided for in statutes, and the income constitutes miscellaneous receipts which by law must be returned to the U.S. Treasury.

S. REP. NO. 93-937, 93d Cong., 2d Sess., at 22 (1974). Congress resolved these concerns by changing the Randolph-Sheppard Act to grant priority, rather than preference, to blind persons operating vending facilities.

The Federal Circuit decision in Texas State Comm'n for the Blind v. United States, 796 F.2d 400, 402-03 (Fed. Cir. 1986) (en banc), cert. denied, 479 U.S. 1030, 93 L. Ed. 2d 828, 107 S. Ct. 874 (1987), resulted from an appeal from a judgment of the United States Claims Court which upheld the decision of an arbitration panel convened by the Department of Health, Education and Welfare, concerning the exemption of military exchanges from provisions of the Randolph-Sheppard Act. In its opinion the court reviewed the historic tension between the Randolph-Sheppard Act, which provides blind persons with remunerative employment opportunities by permitting them to operate vending stands in federal buildings, and the practice of allowing federal employee organizations to utilize federal property free of charge for similar purposes and to retain the funds. The court's review reveals a history of GAO and congressional inaction despite an awareness of the questioned legality of the employee groups' retention of funds and the fact that competition with the blind weakened the effectiveness of the Randolph-Sheppard Act. Id. We agree with the district court that these sources constitute public disclosures of the type contemplated by the FCA. Cf. United States *ex rel.* Springfield Terminal Rv. Co. v. Quinn, 14 F.3d at 653 (publicly filed discovery materials constitute public disclosures in a civil hearing); United States

ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d at 1155 ("hearing" construed broadly to include allegations and discovery disclosed in connection with civil, criminal or administrative litigation).[5]

Determining that the opinions and legislative history constitute public disclosures, however, does not end the inquiry. We still must determine whether Findley's suit was "based upon ... allegations or transactions" described in these public disclosures. The district court found that the jurisdictional bar was triggered by these disclosures because the information in the public domain was sufficient to enable the government to bring suit against the FPC-Boron Employees' Club without Findley's involvement. As we explained in United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d at 654, "qui tam actions are barred only when enough information exists in the public domain to expose the fraudulent transaction ... or the allegation of fraud...."

Findley insists that the assertions detailed in his complaint address different allegations or transactions than those already in the public domain and points out that none of the public disclosures claims that

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[5] The Employees' Club also relies on the existence of a BOP Program Statement and Institutional Supplement issued by the United States Department of Justice. The sparse record before us discloses few facts concerning the public availability of these documents, and the United States Supreme Court has set for argument a case that will address the application of the "public disclosure" prong of the jurisdictional test when information is "potentially" available under the Freedom of Information Act, 5 U.S.C. § 552, but has not been actually disclosed. See United States *ex rel.* Schumer v. Hughes Aircraft, 63 F.3d 1512 (9th Cir. 1995), cert. granted, 117 S. Ct. 293 (1996). In any case, the resolution of whether these documents are public disclosures within the meaning of the FCA would not affect the outcome of this case, so there is no need for us to discuss them further.

vending machine income is being detoured in violation of the Competition in Contracting Act, 41 U.S.C. § 253 et seq., the Randolph-Sheppard Act, 20 U.S.C. § § 107-107f, and various other federal regulations and criminal prohibitions. He analogizes his identification of the BOP employees' organizations with that of an individual blowing the whistle on specific defense contractor overcharges, and warns that a subject matter public disclosure bar based on the occurrence of numerous congressional hearings concerning generic defense contractor fraud would frustrate the purpose of the qui tam provisions by foreclosing suits by whistleblowers who have identified specific instances of fraudulent conduct.

We acknowledge that "Congress did not prescribe by mathematical formulae the quantum or centrality of nonpublic information that must be in the hands of the qui tam relator in order for suits to proceed." United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d at 653. Nevertheless, it is our task to ensure that "qui tam suits are limited to those in which the relator has contributed significant independent information...." Id. The Act triggers the jurisdictional bar only when there has been a public disclosure of "allegations or transactions," which it explicitly refers to in the disjunctive. United States *ex rel.* Precision Co. v. Koch Indus., Inc., 971 F.2d at 552 n.2. The term "'allegation' connotes a conclusory statement implying the existence of provable supporting facts." Id. at 653-54 (citation omitted). The term "'transaction' suggests an exchange between two parties or things that reciprocally affect or influence one another." Id. at 654. We illustrated the meaning of these terms in Springfield Terminal, 14 F.3d at 654, with the following equation: X (misrepresented state of facts) + Y (true state of facts) = Z (fraud). X and Y represent the material elements of fraud; "a qui tam action cannot be sustained where all of the material elements of the fraudulent transaction are already in the public domain...." Id. at 655. When the publicly disclosed transaction is sufficient to raise the inference of fraud (X + Y are in the public domain), there is "little need for qui tam actions, which tend to be suits that the government presumably has chosen not to pursue or which

might decrease the government's recovery in suits it has chosen to pursue." Id. at 654.

Each of the public disclosures that we rely on raises the specter of "foul play" by acknowledging the questionable legality of permitting federal employees to use federal facilities for the provision of vending services and retaining revenue from such services. Cf. United States ex rel. Rabushka v. Crane Co., 40 F.3d at 1512-13 (public disclosures gave no hint of wrongdoing); United States *ex rel.* Mikes v. Straus, 931 F. Supp. 248 (S.D.N.Y. 1996) (public disclosures contain no allegation of fraud and refer to a different type of transaction than the qui tam suit). The disclosures recognize that the practice occurs throughout the federal government, thus their relevance cannot be confined to specific agencies. On the other hand, unlike in the defense industry example, the public disclosures here specifically identify the nature of the fraud--illegal retention of monies owed to the government and unauthorized administrative approval of the practice--as well as the federal employee actors engaged in the allegedly fraudulent activity. Little similarity exists between combing through the myriad of transactions performed by the various defense contractors in search of fraud and finding easily identifiable federal employee organizations that provide vending services on federal property. Compare United States *ex rel.* Fine v. Sandia Corp., 70 F.3d 568, 572 (10th Cir. 1995) (applying jurisdictional bar to disclosure of fraud by specific Department of Energy laboratory after public disclosure of same fraud by other Department of Energy laboratories in GAO hearing because the entities and transactions were easily identifiable) with Cooper v. Blue Cross and Blue Shield of Florida, Inc., 19 F.3d 562 (11th Cir. 1994) (GAO report discussing widespread Medicare Secondary Payer Fraud which does not mention Blue Cross Blue Shield is not sufficient to trigger the jurisdictional bar). In this case, we have no trouble in finding enough information in the public domain to identify the employees' groups' allegedly fraudulent transactions.

Our reading of Findley's complaint reveals allegations which substantially repeat what the public already knows and add only the

identity of particular employees' clubs engaged in the questionable and previously documented generic practice. In relevant part, Findley's complaint states:

> The actions of the Employee Organizations in obtaining vending machine income from BOP facilities, and in retaining that income, constitute violations of the provisions of 31 U.S.C. § § 3729(a)(1-7) (1988). The Employee Organizations have possession, custody and control of money to be used by the Government and, intending to defraud the Government or willfully to conceal the property, they have delivered, or caused to be delivered, less money than the amount due. They have knowingly obtained public property from officers and employees of the Government who may not lawfully provide that property. They have knowingly made, used, or caused to be made or used, false records and statements to conceal, avoid or decrease an obligation to pay or transmit money to the Government. The Employee Organizations have presented the Government with numerous false and fraudulent records and statements in which the Employee Organizations falsely and knowingly claim a right to money or property of the Government, including records and statements relating to the receipts obtained by the Employee Organizations. Financial documents provided by the Employee Organizations to the BOP, and required to be provided by the Program Statement, knowingly and falsely reflect that the Employee Organizations are entitled to retain income received from vending machines at BOP facilities, when in fact the Employee Organizations are not entitled to retain any of the vending machine income.

Complaint at ¶ 18. Findley's conclusory allegations offer at best collateral information; they do not introduce elements of new wrongful transactions or material elements to the publicly disclosed transaction.

Findley's insistence that his claim survives because the public disclosures do not allege violations of the particular federal statutes

listed in his complaint is without merit. A relator's ability to recognize the legal consequences of a publicly disclosed fraudulent transaction does not alter the fact that the material elements of the violation already have been publicly disclosed. "The relator must possess substantive information about the particular fraud, rather than merely background information which enables a putative relator to understand the significance of a publicly disclosed transaction or allegation." United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d at 1160. If a relator merely uses his or her unique expertise or training to conclude that the material elements already in the public domain constitute a false claim, then a qui tam action cannot proceed. United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d at 655; see United States *ex rel.* Fine v. Sandia Corp., 70 F.3d at 572 (different legal theories do not redeem a complaint based on publicly disclosed transactions).

We conclude, therefore, that because relator Findley's complaint merely echoes publicly disclosed, allegedly fraudulent transactions that already enable the government to adequately investigate the case and to make a decision whether to prosecute, the public disclosure bar applies. Accordingly, we move on to the second part of the jurisdictional test, which would permit an exception to the jurisdictional bar if Findley was an "original source" of the "information on which the allegations are based."

B.

The second part of the jurisdictional test, which permits an exception to the public disclosure bar whenever the relator is an "original source of the information," was a significant feature of the 1986 amendment of the FCA because, as discussed above, it was precipitated by cases that barred qui tam suits brought by individuals who first disclosed information concerning fraud to the government. See United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co., 944 F.2d at 1160. After conflating the public disclosure and original source inquiries, the district court determined

that relator Findley was not an original source "because the information that relators bring has been a subject of discussion in Congress, in the GAO, and in the Federal courts over the past forty years, as well as appearing in publicly available BOP documents, relators cannot be considered to possess the 'independent knowledge' necessary to be an 'original source.' " United States *ex rel.* Findley v. FPC-Boron Employees' Club, No. 94-1477, slip op. at 9.[6] We agree with the district court's ultimate conclusion, but for different reasons.

1. Prior Judicial Interpretations of the "Original Source" Exception

The jurisdictional test permits a relator whose complaint echoes allegations or transactions in the public domain to nonetheless proceed with the suit if she "is an original source of the information." 31 U.S.C. § 3730(e)(4)(A). Subparagraph (B) of the provision states that an "original source" is "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the government before filing an action...." 31 U.S.C. § 3730(e)(4)(B). As with the "public disclosure" prong, courts addressing the "original source" prong of the jurisdictional bar have interpreted it in varying ways.

The Second and Ninth Circuits have construed the original source provision as limited to whistleblowers who, in addition to having direct and independent knowledge of the information that was publicly disclosed, had a hand in the specific public disclosure. United States *ex rel.* Dick v. Long Island Lighting Co., 912 F.2d 13, 16-18 (2d Cir. 1990); Wang v. FMC Corp., 975 F.2d at 1417-20. The Second Circuit

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[6] The court's reference to "publicly available BOP documents" may be a reference to the BOP Program Statement and Institutional Supplement. As noted above, we do not rely on these documents as public disclosures.

conducted an analysis that was heavily influenced by statements in the Act's legislative history evidencing a congressional intent to spur informers to come forward at an early date. The court reasoned that the word "information" in subparagraph (A) refers to information publicly disclosed, whereas "information" in subparagraph (B) refers to the information that supplies the basis for the qui tam action itself. Then, because the court determined that Congress must have intended the phrase "original source of the information" from subparagraph (A) to refer to different information than the phrases "direct and independent knowledge of the information" and "voluntarily provided the information" which are included in subparagraph (B), the Second Circuit determined that subparagraph (A) stated an additional criterion that an "original source" must meet. United States *ex rel.* Doe v. John Doe Corp., 912 F.2d at 16-18. The court concluded that the "most natural reading" of the Act indicated that in order to qualify as an original source, a qui tam relator must (1) have "direct and independent knowledge of the information on which the allegations are based," (2) "voluntarily provide[ ] that information to the Government," and, in addition, (3) "have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based." United States *ex rel.* Dick v. Long Island Lighting Co., 912 F.2d at 16-17.

The Ninth Circuit agreed with the Second Circuit, but because the court found the text of the statute unclear, the court explicitly based its decision on the history and purpose of the FCA. Wang v. FMC, 975 F.2d at 1419; see also United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d at 1154 (relying on the principal "intent" of the FCA in order to understand the meaning of the "original source" exception).[7]

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[7] In United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d at 657 n.12, we explicitly declined to address whether the qui tam plaintiff must itself have had a hand in the public disclosure that triggers the jurisdictional bar.

(continued...)

The Fourth Circuit criticized these approaches in United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d at 1350-55, as imposing an extra textual requirement, not intended by Congress, that requires a relator to be a source of the public disclosures. Instead, the court adopted an interpretation of the exemption that relies on the provision's subparagraph (B) description of "original source" without any consideration of how it relates to subparagraph (A), which actually announces the exemption to the public disclosure jurisdictional bar. According to the Fourth Circuit, after there has been a public disclosure that triggers the jurisdictional bar, meaning that an individual derived his knowledge of fraud from a public disclosure, that individual can still be an original source so long as he obtains direct information independently, i.e., not from the public disclosure, and voluntarily provides it to the government. We have already questioned the logic of this approach. While we agree with the Fourth Circuit that the exemption is not limited to individuals who were original sources to the entity that publicly disclosed the fraud, we do not adopt the entirety of the Fourth Circuit's "original source" construction either because it too fails to harmonize subparagraph (B) with subparagraph (A), each of which we find to be a necessary component of the exception.

2. The Meaning of the "Original Source" Exception

Section 3730(e)(4)(A) of the FCA provides that "no court shall have jurisdiction over an action ... based upon the public disclosure of allegations or transactions ... unless ... the person bringing the action is an original source of the information." Read by itself, subparagraph (A) suggests that the exemption to the jurisdictional bar applies when a relator initially exposed information that was later publicly disclosed. The ambiguity that has led to disagreement among the circuits is caused by the description of an "original source" in subparagraph (B). It states

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(...continued)

that an "original source" is "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action...." 31 U.S.C. § 3730(e)(4)(B). Standing on its own, subparagraph (B) suggests that an "original source" need only have direct and independent knowledge of the allegations in the qui tam complaint. The two subparagraphs must be read together, however, in order to divine Congress' real intent.

We have already decided that the public disclosure bar is triggered when a relator files an action that is substantially similar to "allegations or transactions" already in the public domain. The relator may pursue her suit, however, if she is an "original source of the information." 31 U.S.C. § 3730(e)(4)(A). The word "information" refers to "any essential element of the fraud transaction (e.g., Y)." United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d at 657. Subparagraph (B) explicates the meaning of "original source." Subparagraph (B) requires that an "original source" have "direct and independent knowledge of the information on which the allegations are based...." In order to be "direct," the information must be first-hand knowledge. In order to be "independent," the information known by the relator cannot depend or rely on the public disclosures. United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d at 657. Therefore, a person who learns of fraud from a public disclosure can never be an "original source."

"The allegations" referred to in subparagraph (B) can only mean those allegations publicly disclosed, since those are the only allegations mentioned at all in section 3730(e)(4). See Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433, 76 L. Ed. 1204, 52 S. Ct. 607 (1932) (identical words used in different parts of the same statutory section are intended to have the same meaning); United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d at 1352. Thus, an "original source" is a relator with direct and independent knowledge of "the information [i.e., any essential element of the fraud transaction] on which the [publicly disclosed] allegations are based...." Relator Findley

cannot meet this requirement because, however much direct and independent knowledge he may have of the information in his complaint, he does not have direct and independent knowledge of the information on which the publicly disclosed allegations are based.

We agree with the Fourth Circuit, however, that there is no additional requirement that the "original source" be responsible for providing the information to the entity that publicly disclosed the allegations of fraud. To qualify as an "original source," a relator must also have "voluntarily provided the information to the government" before filing a qui tam suit which is "based on the information." 31 U.S.C. § 3730(e)(4)(B). Significantly, the statute only contemplates an "original source" being a "source" to the government. A person who provided information to the government that subsequently was uncovered by a reporter and printed in the newspaper, would still be able to maintain a qui tam action.

We differ from the Fourth Circuit in one respect, however. It is clear to us that an "original source" must provide the government with the information prior to any public disclosure. We previously noted that the government notice part of the "original source" exception may appear extraneous in light of the statute's filing provisions, which require cases to be filed under seal for a period of at least sixty days and served only on the government. The "original source" government notification provision is not superfluous, however, for it serves an entirely different purpose from the statute's filing and government notice provisions. By protecting a party who initially exposes fraud to the government, Congress "corrected" the holding of United States *ex rel.* Wisconsin v. Dean. Once the information has been publicly disclosed, however, there is little need for the incentive provided by a qui tam action. Thus, the only reading of the statute that accounts for the requirement that an "original source" voluntarily provide information to the government before filing suit, and Congress' decision to use the term "original source" rather than simply incorporating subparagraph (B)'s description into subparagraph (A), is one that

requires an original source to provide the information to the government prior to any public disclosure.

In this case, relator Findley has stated that he was unaware of the public disclosures that we relied on in determining that the jurisdictional bar has been triggered and that he learned of the practices of the FPC-Boron Employees' Club when he attended a conference at FPC-Boron. Because the employees' groups' questionable transactions were publicly disclosed in a manner recognized by the FCA before Findley even became aware of the practices, he cannot qualify as an original source who is exposing essential elements of a fraudulent transaction that have not previously been publicly disclosed.

IV. CONCLUSION

The FCA's jurisdictional bar against qui tam actions "based upon the public disclosure of allegations or transactions" applies in a suit such as this one, where the information in the public domain at the time the FCA suit was brought was sufficient to enable the government to adequately investigate the case and to make a decision whether to prosecute. Relator Findley cannot qualify as an "original source" because he had no knowledge of any of the essential elements of the publicly disclosed fraudulent transactions prior to their public disclosure. Accordingly, we affirm the district court's dismissal of this action.

So Ordered.

APPENDIX C-JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT FILED JANUARY 24, 1997

No. 95-7189 **September Term, 1996**
No. 94cv01477

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, *ex rel.* D.J. FINDLEY,

Appellant,

v.

FPC-BORON EMPLOYEES' CLUB, et al.,

Appellees.

BEFORE: WALD, WILLIAMS and TATEL, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is **ORDERED** and **ADJUDGED,** by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk

BY:

s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Date: January 24, 1997

Opinion for the Court filed by Circuit Judge Wald.

APPENDIX D-MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA FILED JUNE 30, 1995

No. 94-1477 (NHJ)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *ex rel* D.J. FINDLEY, AND PAUL A. LAZERSON,

Plaintiffs/Relators,

v.

FPC-BORON EMPLOYEES' CLUB, *et al.*,

Defendants.

Decided and Filed June 30, 1995

Before: Norma Holloway Johnson, District Judge.

JOHNSON, District Judge. This is a qui tam action, under the False Claims Act, 31 U.S.C. §§ 3729-3733 (1988), brought by relators D.J. Findley and Paul A. Lazerson on behalf of the United States. Relators seek injunctive relief and damages, alleging that the Employees' Club for the Federal Prison Camp ("FPC") at Boron, California, has unlawfully diverted profits from vending machines at FPC-Boron and used that income for the benefit of Federal Bureau of Prisons employees. The United States has declined to intervene as a plaintiff in this case. Relators have moved to certify a class of defendants comprising all BOP Employee Organizations providing vending machine services at BOP facilities or obtaining any revenue from the provision of such vending machine services. Defendant FPC-Boron Employees' Club has moved to dismiss the complaint pursuant to Rules 12 (b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Upon consideration of the complaint, the motion, and the

memoranda in support thereof and in opposition thereto, the Court will grant the motion to dismiss for lack of subject matter jurisdiction pursuant to 31 U.S.C. § 3130(e)(4). Relators' motion to certify the defendant class is denied as moot.

BACKGROUND

FPC-Boron has seventeen vending machines. Six are located solely in the inmate areas; eleven are located in the employee and visitor lounge areas. The Employees' Club maintains and procures services for eleven vending machines located in the employee and visitor lounge areas. BOP provides the space and utilities for the vending machines. The Employees' Club takes 85% of the profit from the vending machines located in visiting rooms ("Class 1") and 100% of the profit from the vending machines located in areas where inmates have no access ("Class 2"). BOP deposits the profits from the six vending machines located in the inmate areas ("Class 3") and 15% of the profits from Class 1 vending machines into a trust fund maintained to purchase recreational equipment for inmates. The above terms are set forth in BOP Program Statement 3721.04 (February 24, 1992) (Complaint, Ex. 1, p. 11). The Employees' Club uses the rest of the profits for organization events such as parties and trips.

Relators allege that defendant's retaining of the profits from the vending machines violates 31 U.S.C. §§ 209, 3729(a), and 3302 because, they claim, all of the profits should be deposited in the U.S. Treasury. Relators also allege violations of 41 U.S.C. § 253 (*3) (1988) and 48 C.F.R. ch. 1 (1993). Relators appear to be affiliated with Premiere Vending, a company that failed to win a contract to supply some of the vending machines at FPC-Boron. See Exhibits to Complaint. After it lost the contract, Premiere Vending filed a protest of the award with the General Accounting Office, alleging a violation of the Competition in Contracting Act ("CICA"), 31 U.S.C. § 3551, et seq. The GAO rejected Premiere's arguments because the Employees' Club is not a Federal agency and thus is not subject to CICA. See

Def.'s Ex. 1. The day after GAO denied Premiere Vending's protest, relators filed the present action.

DISCUSSION

The Court of Appeals for this Circuit has recently described the history of the False Claims Act, see United States ex rel. Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 649-52 (D.C. Cir. 1994), a lengthy history that begins during the Civil War and has most recently been impacted by the 1986 amendments. The court concluded that "[t]he history of the FCA qui tam provisions demonstrates repeated congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior." Id.

The jurisdictional provision of the FCA is 31 U.S.C. § 3730 (*4) (1988), and it sets forth a two-part test. First, the reviewing court must ascertain whether the "allegations or transactions" upon which the suit is based were "public[ly] disclos[ed]" in a "criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." 31 U.S.C. § 3730(e)(4)(A). If, and only if, the answer to the first question is affirmative will the reviewing court proceed to the second part of the test, in which the court must determine whether the qui tam relator was the "original source," meaning, "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). If the relator qualifies as an original source, the action may proceed; if the relator does not, the action is barred for lack of subject matter jurisdiction. The Court may look to matters outside the pleadings when considering a motion to dismiss for lack of subject matter jurisdiction. See Herbert v. National Academy of Sciences, 974 F.2d 192, 198 n.6 (D.C. Cir. 1992); In re Swine Flue Immunizations Prod. Liab. Litig., 880 F.2d 1439, 1442 (D.C. Cir. 1989).

Appendix D

Defendant argues that the Court lacks subject matter jurisdiction because the Employees' Club's retaining of the vending machine profits is publicly disclosed information and because relators are not the original source of the information. In support of its argument, defendant has produced materials showing that the issue of whether such employees' clubs may retain vending machine profits has been considered by the Comptroller General and Congress. In 1986, the Court of Appeals for the Federal Circuit discussed extensively the practice of allowing employees' groups to utilize Federal property free of charge and retain the funds without any accountability. Texas State Commn. for the Blind v. United States, 796 F.2d 400 (Fed. Cir. 1986), cert. denied, 479 U.S. 1030 (1987). The court addressed the issue in context of the Randolph-Sheppard Act, 20 U.S.C. § § 107-107f (1988), an act which gives blind vendors priority in operating vending machines on Federal property. Apparently, that statute, which was enacted in 1936, achieved less than total success in its mission, in part due to the existence of employees' groups that were allowed to run vending machines on Federal property. Id. at 402. In 1952, the Comptroller General issued an opinion on the topic with respect to post office employees' groups, stating:

> [I]t appears that contractual arrangements for the installment purchase, installation, and operation of vending machines at various post offices were made by postal employee groups with administrative approval, and with the understanding that any proceeds received by the employee groups from the operation of the machines could be retained by them. While the legal authority of the administrative officials to have agreed to such an arrangement is doubtful, it has been concluded that this Office will interpose no objection to the continued use of proceeds for employee general welfare activities pending further action in the matter by the Congress in the form of clarifying legislation as recommended in the report of this Office to the Congress . . . .

Vending Machines, B-112840, 32 Comp. Gen. 282, 284 (1952), cited in Texas State Commn. for the Blind, 796 F.2d at 402. The Randolph-Sheppard Act was amended in 1954 and in 1974 in order to give blind vendors more preference in operating vending machines. The fact that employee groups were competing with blind vendors was not missed by Congress; indeed, the Federal Circuit noted that, in 1962, Senator Randolph proposed further amendments to the Randolph-Sheppard Act, "specifically recogniz[ing] that vending machines of civilian employee groups were the source of the problem and urg[ing] that such groups could and should find 'other means of financing [their] projects.'" Texas State Commn. for the Blind, 796 F.2d at 402, quoting Operation of Vending Operation of Vending Stands for the Blind in Federal Buildings: Hearing on S. 394 Before the Special Subcomm. of the Senate Comm. on Government Operations, 87th Cong., 2d Sess. 10 (1962). In amending the Randolph-Sheppard Act in 1974, the Senate noted that:

> Federal employee welfare and recreation groups have for many years depended for their activities on income derived from vending machines on Federal property. Their spokesmen, chiefly representatives of the postal unions, have defended the retention of such income as being essential for the morale of Federal employees. Blind organization representatives strongly object to the retention of this income by employee groups, stating that vending machines operated by or for such groups compete with blind vending facilities and pose serious threats to the livelihood of blind vendors. Further, they say federal law and opinions of the Comptroller General support the position that such income may not legally accrue to such groups -- their operation is not provided for in statutes, and the income constitutes miscellaneous receipts which by law must be returned to the U.S. Treasury.

Randolph-Sheppard Act Amendments of 1974, S. Rep. No. 937, 93rd (*7) Cong., 2d Sess. (1974). The compromise position reached by the

Committee on Labor and Public Welfare was that "Postal and other Federal employees will continue to be permitted to retain a substantial portion of such income." Id.; see also Texas State Commn. for the Blind, 796 F.2d at 414.

It is clear from these passages that the fact that Federal employees' groups retain profits from vending machines has been publicly disclosed pursuant to the standards of 31 U.S.C. § 3730(e)(4)(A). The above passages clearly fall into the categories of "congressional report," "civil hearing," or "Government Accounting Office report" as set forth by the False Claims Act.

The Court rejects relators' assertion that the only disclosure of the operation of the vending machines has been among BOP employees themselves. This case is not like United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991), where the United States argued that James M. Hagood, a government employee, had "disclosed" to himself, a member of the public, the information on which he based his suit. The Ninth Circuit stated, "The United States concedes that one government employee telling another government employee is *not* public disclosure. The notion that we should subdivide Hagood into his governmental self and his nongovernmental self is too metaphysical a contention for the interpretation of a plain congressional enactment." Id. at 1419. Although there clearly was disclosure in the present case among BOP employees themselves, see e.g., BOP Program Statement, Complaint Ex. 1, it is also clear that Congress, the Comptroller General, and the United States Court of Appeals for the Federal Circuit were aware of, and published decisions discussing, the operation of vending machines by Federal employees' groups.

Looking to the distinction set forth by the Court of Appeals in Springfield, 14 F3d. at 653-53, between "allegations or transactions," 31 U.S.C. § 3730(e)(4)(A), and ordinary "information," the Court concludes that the vending machine material discussed by Congress, the

Comptroller General, and the Court of Appeals for the Federal Circuit is sufficient to constitute an allegation of fraud on behalf of Federal employees' groups in their retaining of vending machine profits. Before the filing of this action, enough information was in the public domain to expose the allegation that government employees are perpetrating a fraud upon the government by maintaining vending machines on Federal property. The government itself presumably could have brought an action against employees' clubs such as the one at FPC-Boron.

Accordingly, there is no need for a qui tam suit in the present case. The government does not need private parties to point out that Federal employees' groups are retaining vending machine profits when Congress has already addressed the issue and decided not to do anything about it.

Because the first prong of the § 3730(e)(4)(a) test has been answered in the affirmative, the Court must next determine whether relators qualify as an "original source" of the information. Springfield, 14 F.3d at 651. Because the information that relators bring has been a subject of discussion in Congress, in the GAO, and in the Federal courts over the past forty years, as well as appearing in publicly available BOP documents, relators cannot be considered to possess the "independent knowledge" necessary to be an "original source." 31 U.S.C. § 3730(e)(4)(B).

The Court lacks subject matter jurisdiction over relators' qui tam claim because the allegations of fraud that they bring have been publicly disclosed in a civil hearing, a congressional report, and a GAO report, and relators are not an original source of the information.

The complaint must be dismissed. An appropriate Order will issue.

s/Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON

Appendix D

UNITED STATES DISTRICT JUDGE

DATED: June 30, 1995

ORDER

Upon consideration of the motion of defendant FPC-Boron Employees' Club to dismiss the complaint in this case, the memoranda in support thereof and in opposition thereto, and for the reasons set forth in the Memorandum Opinion issued on this date, it is this 30th day of June, 1995,

ORDERED that the motion to dismiss [#19] for lack of subject matter jurisdiction pursuant to 31 U.S.C. § 3730(e)(4)(a) (1988) be, and hereby is, granted; it is further

ORDERED that relators' motion to certify the defendant class [#13] be, and hereby is, denied as moot.

s/Norma Holloway Johnson

NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

FILED: June 30, 1995

(2)

Supreme Court, U.S.
FILED
AUG 27 1997
CLERK

No. 97-157

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

UNITED STATES EX REL. D.J. FINDLEY,
Petitioner,

v.

FPC-BORON EMPLOYEES' CLUB, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 105 F.3d 675 (D.C. Cir. 1997), and is reprinted in petitioner's appendix ("Pet. App.") at 3a-31a. The order denying petitioner's petition for rehearing is reprinted in petitioner's appendix at 1a-2a. The district court's opinion and order dismissing this case is unreported but is reprinted in petitioner's appendix at 34a-41a.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1997 (Pet. App. 32a-33a). The petitioner's petition for rehearing was denied by the court of appeals on March 18, 1997 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on June 16, 1997. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent statute involved is 31 U.S.C. § 3730 (e)(4)(A) and (B). It provides:

> (e) Certain actions barred—
>
> . . . .
>
> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

STATEMENT OF THE CASE

1. This case arises under the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3729, *et seq.*, and presents issues concerning that Act's public disclosure bar. 31 U.S.C. § 3730(a)(4)(A). The facts are generally not in dispute. The case stems from a controversy over a federal employee organization's contract to supply vending machines at the Federal Prison Camp in Boron, California ("FPC-Boron").

The FPC-Boron Employees' Club is an organization of federal employees employed at FPC-Boron. Like numerous other federal prison employee groups in the United States, the FPC-Boron Employees' Club operates primarily

as a recreational and morale-boosting entity for its federal employee members. The Bureau of Prisons ("BOP") has officially sanctioned and recognized the importance of such employee clubs:

> [t]he intent of employee organizations within the BOP is to provide and develop for our employees a support system for the "Bureau Family" by having activities that allow employees and their families to work together toward the completion of a project or enjoy the activity being sponsored.

BOP Program Statement 3721.04 (Feb. 24, 1992). Recognizing that employee clubs require a source of income in order to operate, the BOP further provides in its Program Statement:

> [t]o support these activities, employee organizations raise funds to defer the cost of the projects/activities. The intent of fund raisers is to have sufficient funds to offset the expenses of programs offered, not to create large reserves or to have large business organizations. Ideally these organizations have nominal reserves from one year to another.

Id.

The Program Statement specifically authorizes that employees' clubs may keep certain profits from vending machines located at the federal prison facility. The Program Statement divides vending machines into three groups: (1) vending machines located in visiting rooms used by inmates and visitors (Class 1); (2) vending machines located in areas where inmates have no access, such as staff lounges and other employee areas (Class 2); and (3) vending machines located in prison common areas for use primarily by the inmates (Class 3).

The BOP Program Statement allocates responsibility for the maintenance of Class 1 and 2 vending machines to employees' clubs. The clubs, however, may retain all profits generated by Class 2 vending machines and eighty-five percent of the profits generated by Class 1 vending

machines. *Id.* The remaining fifteen percent of those profits go to the BOP. *See also* BOP Institution Supplement 3721.04 (March 9, 1994). The BOP itself is responsible for Class 3 vending machines and retains all profits generated by them. The BOP deposits all of the profits from the Class 3 vending machines plus the fifteen percent from the Class 1 machines into a Trust Fund maintained by BOP to purchase recreational equipment for inmates. Pet. App. 35a. *See also Premiere Vending*, B-256560, 73 Comp. Gen. 213 (1994).[1]

2. In September 1993, the BOP issued a Request for Proposals to provide vending food services for the six inmate (Class 3) vending machines. At a pre-proposal conference for prospective offerors, members of the FPC-Boron Employees' Club distributed copies of a separate procurement for maintaining and servicing the eleven employee and visitor lounge (Class 1 and Class 2) vending machines. *Id.* at 214. One of the offerors present was Premiere Vending, of which petitioner is a senior official. On December 30, 1993, petitioner, on behalf of Premiere Vending, wrote to BOP and questioned the authority of the FPC-Boron Employees' Club to conduct a procurement for the eleven Class 1 and 2 vending machines. *Id.* After the FPC-Boron Employees' Club awarded the contract for its vending machines to one of Premiere Vending's competitors, Premiere Vending protested with the General Accounting Office ("GAO") arguing, *inter alia*, that the award violated the Competition in Contracting Act ("CICA"), 41 U.S.C. § 253, *et seq.* On July 5, 1994, GAO rejected that and Premiere Vending's other arguments. *Premiere Vending.*[2]

---

[1] FPC-Boron has seventeen vending machines. Six are located solely in the inmate areas primarily for the use of the FPC-Boron inmates. The remaining eleven are located in the employee and visitor lounge areas. 73 Comp. Gen. at 214; Pet. App. 35a.

[2] Premiere Vending filed a separate, but similar, protest with GAO challenging the terms of requests for proposals to supply

The very next day, petitioner and another Premiere Vending official filed this action under seal in the United States District Court for the District of Columbia as a putative *qui tam* class action. Pet. App. 5a, 36a. Petitioner and his co-relator asserted that the failure of BOP employee organizations to deposit into the United States Treasury profits from the Class 1 and 2 vending machines (as opposed to keeping those monies) violates the False Claims Act and various other civil and criminal statutes. The United States declined to intervene as plaintiff and the complaint was unsealed. *See* 31 U.S.C. § 3730; Pet. App. 5a.

Respondents promptly filed a motion to dismiss arguing, *inter alia*, that 31 U.S.C. § 3730(e)(4) deprives the district court of subject matter jurisdiction since the allegations or transactions that form the basis of the complaint have already been "publicly disclosed" and petitioner and his co-relator are not the "original source" of the information. Specifically, respondents argued that the retention of vending machine income by federal employee organizations is information that has been in the public domain for many years and petitioner and his co-relator are not the "original source" of the information.

The district court (the Honorable Norma Holloway Johnson) agreed and dismissed the complaint. Pet. App. 34a-41a. The court held that 31 U.S.C. § 3730(e)(4) is a subject matter jurisdiction provision that establishes a two-part test: (1) whether the subject matter of the suit has been "publicly disclosed;" and (2) whether the relator was the "original source" of the information. If the information has been publicly disclosed and the relator is not the original source, subject matter jurisdiction is lacking and the case must be dismissed. Pet. App. 36a.

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vending machines at the Federal Prison Camp in Dublin, California. On June 23, 1994, GAO similarly denied that protest. *See Premiere Vending*, B-256437, 73 Comp. Gen. 201 (1994).

Applying the two-part test, the district court determined first that the subject matter of this action has long been publicly disclosed via a variety of avenues specified in the statute, such as through a "congressional report," a "civil hearing," and a "Government Accounting Office report." Pet. App. 39a. The court held:

> Before the filing of this action, enough information was in the public domain to expose the allegation that government employees are perpetrating a fraud upon the government by maintaining vending machines on Federal property. The government itself could have brought an action against employees' clubs such as the one at FPC-Boron. Accordingly, there is no need for a *qui tam* suit in the present case. The government does not need private parties to point out that Federal employees' groups are retaining vending machine profits when Congress has already addressed the issue and decided not to do anything about it.

Pet. App. 40a.

The district court determined further that because the subject matter of this action has been in the public domain by way of "discussion in Congress, in the GAO, and in the Federal courts over the past forty years, as well as appearing in publicly available BOP documents," the relators do not qualify as an "original source" as required in 31 U.S.C. § 3730(e)(4)(B). Pet. App. 40a. The court thus concluded that it lacked subject matter jurisdiction under the False Claims Act and dismissed the Complaint.[3] *Id.*

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[3] The FPC-Boron Employees' Club also argued that the acts alleged by the relators are not claims under the False Claims Act and that the Complaint itself fails to state a claim under the False Claims Act. The district court did not address either argument since it had concluded that dismissal was appropriate under 31 U.S.C. § 3730(e)(4).

3. The court of appeals affirmed.[4] In an opinion authored by Judge Patricia Wald and joined by Judges Stephen Williams and David Tatel, the court held that its

> analysis of the language, structure, history and purpose of the [False Claims Act] supports an interpretation of the public disclosure bar that limits qui tam jurisdiction to those cases in which the relator played a role in exposing a fraud of which the public was previously aware. Because we find that [petitioner] is not such a relator, we affirm the district court's dismissal of this action.

Pet. App. 4a. The court engaged in an extensive historical analysis of the purpose undergirding the False Claims Act, as well as the meaning of the language "based upon the public disclosure" codified at 31 U.S.C. § 3730(e)(4)(A), and concluded that Congress sought in the False Claims Act both to "encourage[] whistleblowing and discourage[] opportunistic behavior . . ." Pet. App. 15a, citing *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994) ("Springfield Terminal"). Pet. App. 15a.

The court of appeals further concluded that a "broader construction of the jurisdictional bar," in particular of the term "based upon," is necessary "to encompass situations in which the relator's complaint repeats what the public already knows, even though she had learned about the fraud independent of the public disclosures." Pet. App. 15a. In reaching this conclusion the court explicitly rejected a more narrow interpretation of the public disclosure bar adopted by the Fourth Circuit in *United States ex rel. Siller v. Becton Dickenson & Co.*, 21 F.3d 1339, 1347-50 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994) ("*Siller*"), as "render[ing] the 'original source' exception to the public disclosure bar largely superfluous." Pet. App. 15a.

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[4] Only petitioner appealed the district court's decision.

Applying its analysis of the False Claims Act to this case, the court of appeals identified three instances of "public disclosure" applicable here. First, the court relied upon a 1952 GAO Opinion in *Vending Machines*, B-112840, 32 Comp. Gen. 282 (1952), in which GAO noted that although the legal authority for federal employee groups retaining vending machine profits is "doubtful," GAO declined to halt the practice absent congressional intervention. Second, the court identified a 1974 Senate Report which reflects that Congress, during the process of amending the Randolph-Sheppard Act, considered complaints about the retention by employee groups of vending machine profits but did not proscribe the practice. *See* Senate Report 93-937, 93d Cong., 2d Sess. at 22 (1974). Third, the court cited the published opinion in *Texas State Comm'n for the Blind v. United States*, 796 F.2d 400, 402-03 (Fed. Cir. 1986) (en banc), *cert. denied*, 479 U.S. 1030 (1987), which discusses the historic practice of permitting federal employee organizations to utilize federal property without charge and to retain funds. Pet. App. 19a-20a. Accordingly, the court held that the petitioner's allegations concerning the retention of vending machine profits by federal employee groups "merely echoes publicly disclosed, allegedly fraudulent transactions" long in the public realm. Pet. App. 25a.

Having resolved the first prong of the statute, the court of appeals further determined that petitioner is not the "original source" of the information that federal employee groups retain vending machine profits, and thus is not entitled to an exception to the public disclosure bar. Pet. App. 25a. The court explained that to qualify as an "original source," petitioner must have both "direct and independent knowledge" of the information at issue. *Id.*; 31 U.S.C. § 3730(e)(4)(B). "Direct," according to the court, means "first-hand knowledge" and "independent" means a "relator cannot depend or rely on the public disclosures." Thus, if a relator learns of alleged fraud from a public disclosure, he or she can never be an "original source." Pet. App. 29a. Because petitioner has no "direct

and independent knowledge" of the information at issue here, the court held he cannot qualify as an "original source." Pet. App. 30a.

ARGUMENT

1. Petitioner contends that the Court should grant certiori to resolve a conflict among the circuits in the application and interpretation of the False Claims Act, in particular, the Act's public disclosure bar. There is no disputing that a circuit conflict exists. Indeed, the court of appeals in this case acknowledged as much, noting that "extensive litigation" over various terms in the public disclosure bar has ensued and that about the only thing the lower courts can agree on concerning the public disclosure bar is that "the language of the statute is not, so plain as to clearly describe which cases Congress intended to bar." Pet. App. 10a.

Notwithstanding this admission, the Court should nonetheless deny the petition for certiorari. The appellate decision at issue here is the correct result for the correct reasons. The court of appeals obviously engaged in an extensive and contemplative review of the competing goals of the False Claims Act and its *qui tam* provisions. It also carefully considered and properly rejected the Fourth Circuit's contrary interpretation of the False Claims Act in *Siller*, as essentially reading other provisions of the Act out of the statute. That conclusion is correct. Indeed, the Fourth Circuit by its own admission stands alone in its unique interpretation of the public disclosure bar. *See Siller*, 21 F.3d at 1348 ("other circuits have not embraced this [court's] interpretation" of the "based upon" term).

Specifically, under the Fourth Circuit's approach as explained in *Siller*:

> a relator's action is "based upon" a public disclosure of allegations only when the relator has actually derived from that disclosure the allegations upon which his *qui tam* suit is based.

21 F.3d at 1348. By contrast, all other circuits have "assume[d] instead that an action is based upon a public disclosure of allegations if its allegations are identical or similar to those already publicly disclosed." *Id.* Thus, in all but the Fourth Circuit, "based upon" means that where the factual basis for a *qui tam* suit is in the public domain, "regardless of whether the relator actually derived his knowledge of those facts from that disclosure," the public disclosure bar applies. 21 F.3d at 1349; *Springfield Terminal*, 14 F.3d at 652-55; *see United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992) ("based upon" applies when allegations are "the same as those that ha[ve] been publicly disclosed . . . regardless of where the relator obtained his information."); *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1545-47 (10th Cir. 1996) ("*Fine*") ("based upon" means "supported by" and court rejects *Siller's* "derived from" standard); *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993) (same).

As the court of appeals explained in this case, the Fourth Circuit's definition of "based upon" makes no sense when viewed in the context of the False Claims Act because it effectively renders the "original source" exception in 31 U.S.C. § 3730(e)(4)(B) "superfluous." In other words, if the Fourth Circuit's approach is correct, Congress would have had no reason to enact the "original source" exception that it did enact. Pet. App. 14a-15a. Plainly the District of Columbia Circuit has the better of this argument. Because it does, this case is not the best vehicle for the Court to resolve the circuit conflict. A better vehicle, should the Court decide to resolve the conflict, would be a decision applying *Siller* that reached a questionable result on the merits.

2. The facts of this case also do not warrant a grant of certiorari. Plainly, petitioner advances no compelling reason for a grant of the writ. The essence of petitioner's

position is that because the public disclosures relied upon by the court of appeals—the 1952 GAO decision, the 1974 Senate Report and the 1986 Federal Circuit decision—do not mention the FPC-Boron Employees' Club, his complaint is not "based upon" those public disclosures. Thus, he argues, the public disclosure bar should not bar his action. Pet. 9-10.

Petitioner's argument is without merit. There is no disputing that the practice of federal employee organizations retaining vending machine proceeds has been "publicly disclosed" for forty-five years, that is, at least since the 1952 GAO *Vending Machines* decision. For the public disclosure bar not to apply on these facts, simply because the acknowledged public disclosures described the practice about which petitioner complains (keeping vending machine proceeds), but not the exact entity about which petitioner complains (the FPC-Boron Employees' Club), is both illogical and inconsistent with the language of the statute. Indeed, such a result would encourage opportunistic and parasitic *qui tam* lawsuits, something the 1986 *qui tam* statutory amendments were designed to combat. *Springfield Terminal*, 14 F.3d at 651; Pet. App. 18a.

Also important, as both the court of appeals and the district court recognized, a relator must add something to the prosecutorial equation for his or her *qui tam* suit to proceed. This means the relator must provide some additional "substantive information about the particular fraud" as opposed to "merely background information." Pet. App. 25a, quoting *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991). As the Tenth Circuit has observed, "where public disclosure of the fraud has already occurred, no incentive for a private *qui tam* suit is needed." *Fine*, 99 F.3d at 1546. Here, because petitioner "merely echoes" already disclosed public information, and he has added nothing that would aid a federal

prosecutor interested in pursuing the alleged fraud, the public disclosure bar applies. Pet. App. 25a, 40a.[5]

3. Finally, petitioner was properly determined not to be an "original source" of the information at issue, and thus he does not come within the exception to the public disclosure bar. As noted, to qualify for this exception petitioner must possess both "independent and direct knowledge of the allegedly fraudulent activity." *Fine*, 99 F.3d at 1547; *United States ex rel. Barth v. Ridgedale Elec. Inc.*, 44 F.3d 699, 703 (8th Cir. 1995). Petitioner meets neither test since the information about which he complains has been in the public domain for at least forty-five years. Petitioner nevertheless urges that the "pertinent inquiry" is whether he is "an original source of *the allegations in his Complaint*." Pet. 17 (emphasis in original). That is incorrect. The proper inquiry, set forth in the statute itself, is whether he is an original source "of the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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[5] Moreover, it must be remembered that respondents retain vending machine proceeds pursuant to the authority of the BOP Program Statement.